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To cite this article: Ama Hammond (2019) “Reforming the law of intestate succession in a legally plural Ghana”, *The Journal of Legal Pluralism and Unofficial Law*, 51:1, 114-139, DOI: [10.1080/07329113.2019.1594564](https://doi.org/10.1080/07329113.2019.1594564)

To link to this article: <https://doi.org/10.1080/07329113.2019.1594564>



Published online: 06 Apr 2019.



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# “Reforming the law of intestate succession in a legally plural Ghana”

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## ABSTRACT

There has been minimal compliance with Ghana’s Intestate Succession Act, 1985, (PNDC Law 111) especially by communities in rural areas whose lives are governed almost exclusively by customary law. This is because the state and customary legal systems have failed to reconcile their perceptions of law and legal responsibilities. Drawing on legal pluralism as a practical guiding framework for analyzing the relationship between states and customary legal systems, and focusing on the law of intestate succession, I argue that in order for legal reforms to be embraced, especially by rural dwellers, the state must adopt what may be termed, the mutual concession approach to legal reforms, a structured and principled discretionary approach that seeks to balance the valued interests of both legal systems, and which promises to be more agreeable to rural dwellers in ways that ensure compliance with state law.

## ARTICLE HISTORY

Received 17 September 2018  
Accepted 11 March 2019

## KEYWORDS

Intestate succession;  
traditional family;  
customary law; mutual  
concession approach;  
legal reforms

## Introduction

Reforming customary laws by the state in a legally plural Ghana remains a challenging endeavour. This is related to the fact that customary law reforms have not had the required impact on many rural dwellers who arguably, are resistant to surrendering their customary laws for state laws that may be at variance with the ideals and aims of customary law.<sup>1</sup> (Gedzi 2009a, 110; Kutsoati and Morck 2012, 48). With specific respect to the reform of laws on inheritance, it has been observed that “traditional inheritance norms prevail regardless of the paper law.” (Kutsoati and Morck 2012, 48). This is unsurprising because the existence of a multiplicity of normative orders in a given space, characterised by inequalities, value differences and state privilege inevitably results in struggles for recognition and legitimacy, and competition for dominance. This situation raises legitimate questions about how different legal orders may co-exist and interact meaningfully to facilitate legal change and ultimately, respect for human rights and socioeconomic development.

Thus, drawing on legal pluralism as a guiding framework for analyzing the relationship between the state and customary legal systems, and focusing on the law of

intestate succession, I argue that in order for legal reforms to be embraced, especially by rural dwellers, the state must adopt what may be termed, the mutual concession approach to legal reforms, a practical, structured and discretionary approach that seeks to balance the interests of the state and customary legal systems, and which promises to be more agreeable to rural dwellers in ways that ensure compliance with state law.

I will first give an overview of the law of intestate succession in Ghana, concentrating on the low rate of compliance with the law and explaining how this represents a conflict between the state and customary legal systems in Ghana. This will be followed by an analytical description of the pluralist approaches to law reform proposed by the following legal scholars: Bradford Morse and Gordon Woodman (1988), and Miranda Forsyth (2009). I will then propose a framework for a pluralist law reform approach, which I argue, reflects the lived experiences of most Ghanaians.

### **Intestate succession in Ghana**

The Intestate Succession Act, 1985 (PNDC Law 111) came into force in 1985. Its aim is to provide an equitable and uniform system of intestate succession applicable throughout Ghana, irrespective of the traditional family system to which one belongs,<sup>2</sup> (see generally, Dowuona-Hammond 1998) the type of marriage contracted,<sup>3</sup> (see s. 48 of the Marriage Ordinance) or the religion to which one subscribes (see s.10 of the Marriage of Mohammedans Ordinance).<sup>4</sup> The law was promulgated as a result of what was perceived to be injustice suffered by spouses, especially women and children, whose spouses and parents respectively, died intestate (see Memorandum to PNDC Law 111). The law was regarded as a progressive step in the development of the law on property rights in Ghana because it gives the bulk of the intestate estate to the nuclear family (Dowuona-Hammond 1998, 166). In sum, it has in effect strengthened the nuclear family financially and has elevated it as the more acceptable family unit in Ghana. The extended or traditional families, especially the matrilineal families, which under the customary rules of intestate succession, were entitled to a greater portion of the property of a deceased relative, have for all intents and purposes, been marginalized and disempowered as the legitimate family units in Ghana (see generally, Mensa-Bonsu 1994). This has led to a low compliance rate with the Law especially in the countryside where adherence to customary practices is largely faithfully observed.

Victor Gedzi (2009a, 108), in his ethnographic research on the level of compliance with the Intestate Succession Act surveyed 150 respondents. First, he clarifies that in spite of knowledge of PNDC Law 111 in the countryside, the rate of compliance with the law is very low. Edward Kutsoati and Randall Morck (2012) in their research paper, *Family Ties, Inheritance Rights, and Successful Poverty Alleviation* also found from their survey of 322 widows living in four villages in Southern Ghana that a quarter of a century after the passage of the law, it is seldom applied in rural Ghana and that traditional inheritance norms persist in spite of the reasonable popularity of the Law 111 (3, 20 following). It appears that one of the main reasons for this trend is the meagre portion of intestate property given to the extended family, which is the

backbone of the customary legal system, and the centre around which the socio-economic and political organization of the traditional society revolves. This is corroborated by Gedzi's research, which concludes that "[i]t appears... that the different cultural groups are unwilling to surrender their legal heritages for the new law [PNDC Law 111]" (2009a, 110). It should be borne in mind that part of this heritage is the customary law principle that upon death intestate, the matrilineal family owns the property of their deceased relative. To the rural Ghanaian, customary practices are not just any social practices; they are legal and must be complied with. They also regard customary law as a heritage; an inheritance which will not be given up without resistance. Thus, PNDC Law 111, arguably, makes erroneous assumptions about the socio-cultural and legal leanings of Ghanaians, especially regarding the importance of the extended family.

Many of the problems inherent in this Law are a result of the fact that there are some underlying assumptions of the Law which have been proved incorrect. One of these is that the customary family no longer serves any purpose at all during the life or upon the death of a person... these faulty assumptions have in a substantial way affected the effectiveness of the law and are in no small way responsible for the obvious shortcomings. First of all, it is untrue that the customary family serves no purpose at all during the life time of its members. Although this may be the attitude of the urban elite it is not so for the rural people or the urban poor. Thus, the set-up within which interest in the property of a deceased would be exclusive of all others is not entirely Ghanaian. The family has always been a source of support – financial or moral – for its members (Mensa-Bonsu 1994, 110–111).

The recognition given to the extended family under PNDC Law 111 must thus correspond to its importance in the lives of members of the family.

### ***Understanding the conflict***

The tension between the state and customary legal systems with regard to the rightful beneficiaries of intestate property is a conflict between individual and community aspirations. It stresses the divide between liberalism (Kymlicka 2002, 212) and communitarianism (208–209, 212). The Intestate Succession Act is grounded on the idea that in the distribution of intestate property "the importance of the extended family is shifting to the nuclear family, as pertains in other parts of the world." (Intestate Succession Bill 2013, i). Moreover, the Courts have held that "[w]e need strong nuclear families to build strong nations." (*Neequaye v. Okoe* [1993–94] 1 GLR 547).

However, Agbosu (1983–86, 107), a legal scholar, accuses those who are against the extended family inheriting intestate property as being influenced by "Anglo-American conceptions of tenure and the intrusion of capitalist ideas of private enterprise which stress private ownership of the means of production." He explains further that, "the socio-economic underpinnings of the doctrine [of the nuclear family] is movement away from the traditional, communal, ethical and economic value systems concerning property rights which lay emphasis on social cohesion and strengthening of family bonds" (108).

To Agbosu (1983–86), capitalism will disrupt the ‘community economy’ and impede social cohesion. My aim is to balance conflicting values that the state and customary legal systems hold, in order to find common ground. This balancing act is important because:

"In the exegesis of the customary law, it must continually be borne in mind that we are not making a law for the minority of the urban community alone. ...; [t]he fact that such individualisation policies are acceptable to the urban minority and the educated elite does not necessarily mean that it will be healthy for the rural community or the country as a whole" (110).

On how to achieve this balance, I examine the scholarly views on legal pluralism and law reform advanced by Morse and Woodman (1988), and Forsyth (2009).

### **Scholarly views on legal pluralism and law reform**

As stated above, Morse and Woodman (1988), like Forsyth (2009), attempted to develop a legal pluralist approach to law reform, an approach to legal change that takes into consideration the sensibilities of multiple legal orders in a given space.

Focusing on how the state may relate to customary law, Morse and Woodman (1988) explain that the state may choose to reform or conserve customary law or it may choose to combine these options (6). They explore a variety of legal measures that the state can adopt in its relationship with customary law, classified broadly as negative and positive. The negative measures describe state measures that contradict norms of customary law by prohibiting, either directly or incidentally, a permitted norm or conduct of customary law. State law may also directly or incidentally contradict a customary norm of validation and nullify the effects of such norms (7–10). Prohibition involves the active deployment of state powers to discourage social acceptance of customary law (7). These negative measures characterize the competition that may exist among normative orders. Negative measures are inspired by a commitment to the goals of nation building and economic development, which non-state law is generally believed to inhibit (21).

Positive measures capture the various ways in which the state may recognize, incorporate and acknowledge customary law. Recognition may be by admitting customary law as fact, though this does not entail an acceptance of the legal nature of customary law. In this regard, state law may, in sentencing a convicted criminal, take into account customary law as part of the convict’s social environment and beliefs. This, however, does not involve any adjustment to state law in response to customary law (Morse and Woodman 1988, 10–11).

According to Morse and Woodman (1988), positive measures also include the acknowledgment of existing legitimate powers held by a customary institution. State law may confer on a state institution powers concurrent with those granted or recognized as held by a customary institution. The writers admit that the problem with this approach is the determination of how conflicts will be resolved, unless there is an “all-embracing law” with norms superior to those of the two bodies in conflict. They hold the view that measures of acknowledgment are less likely to distort the social reality of customary law (19–20). These measures describe how legal systems

may complement and depend on each other. They largely exemplify ‘active’ legal pluralism, where each system is given a voice and comparable levels of recognition to be able to hold its own.

Another positive measure is the incorporation of customary law. Here, the state incorporates into its own norms a customary norm or a portion of it. In this regard, imperative norms of customary law are enforced by the state, or norms of validation are incorporated into state law, giving the norms the same legal effect in state law as they have in customary law or a customary law concept is given the same or similar meaning under state law as it has under customary law (11–12). Though he is cautious about generalizing the effects of incorporation, Woodman alone argues that the incorporation of norms usually entails their distortion, as the laws stated are not coterminous with the customary law norms (Morse and Woodman 1988, 15).<sup>5</sup> The laws do not represent the cultures from which they are derived. Incorporation privileges the state and ingrains legal centralism.

Acknowledging Morse and Woodman (1988) as the principal contributors to the development of a legal pluralist approach to law reform, but also observing the inability of their proposed measures of acknowledgment to serve as a comprehensive framework for law reform, Forsyth (2009) suggests her own strategies (48, 52). Essentially, she examines the issue of conflict management between the state and customary legal systems in Vanuatu.

Forsyth (2009), whose pluralistic approach to legal reform focuses on what she terms *doing* legal pluralism, presents seven types of relationships that may exist between the state and non-state justice systems (xix). These describe the interaction, competition, collaboration and interdependence that may characterize relationships among various normative orders. Apart from assessing the potential advantages and disadvantages of these relationships based on their effectiveness, she evaluates the various internal changes and mutual adaptation measures that the various systems will have to effect in order to develop meaningful collaboration between and among them. Finally, she designs a methodology for implementing the types of relationships identified (201–264).

Forsyth’s first model involves the state actively repressing a non-state justice system by formally legislating to ban the latter from exercising any adjudicative powers it may have. In the second model, the state unofficially allows reliance on the non-state justice system though no formal recognition is given to its operation; the state turns a blind eye to the fact that the non-state justice system arbitrates the majority of disputes. In this model, while the state does not actively suppress the non-state justice system, it does not support it in any way (207).

In Forsyth’s (2009) third model, there is no formal recognition, but active encouragement of the non-state justice system by the state and greater collaboration between the two systems. This model, according to her, is the result of the awareness by government of the limitations of the state justice system and the effectiveness of the non-state justice system in certain respects. The support given to the non-state system by the government is active though informal. The legal systems “reinforce each other’s legitimacy, as they are perceived as working together rather than in competition with each other” (208–209).

Under the fourth model, the state gives formal acknowledgement to the jurisdiction of the non-state justice system. This model involves the state giving limited legislative recognition to a non-state justice system, but no exclusive jurisdiction, no coercive powers and minimal financial support. Though there is some collaboration between the two systems, the state does not lend to the non-state its enforcement mechanisms (Forsyth 2009, 210). Forsyth's fifth model involves the state formally recognizing the legitimacy of the non-state system exercising *exclusive* jurisdiction within a defined area or on a specific subject matter. Under this model, the non-state system has the right to enforce its judgments since it is independent of the state (214). The principal advantage of such a system is that it allows non-state systems to function without interference from the state system, such interference having the potential to undermine their effectiveness or interfere with their integrity (216). In the sixth model, the state formally recognizes the adjudicative functions of the non-state and actually gives its coercive powers to the latter (217).

Forsyth's last model involves incorporating the non-state justice system entirely into the state system (222). The significant advantage of this model is that it fosters cross-fertilization of ideas and procedures between the two (223). Non-state systems are made to conform to state constitutions.

The delicate networks of possible interactions between the state and non-state actors described by these scholars exemplify the various degrees of communication involved in managing multiple legal systems. The various forms of interaction demonstrate that legal pluralism does not just consist of the presence of different legal orders co-existing within a given space; it consists of the interaction, collaboration, intercommunication, interdependence, reciprocity and competition that exist between and among various normative orders. A number of legal pluralists have emphasized the intercommunication between legal systems. For instance, John Griffiths (1986, 39) in his, *What Is Legal Pluralism* discussed the "patterns of competition, interaction, negotiation, isolationism" among legal systems.

Moving away from legal pluralism as solely a theoretical construct, I build on the works of Morse and Woodman (1988), and Forsyth (2009) to show how, in practice, their proposed interactions or typologies can be exploited to facilitate legal reforms. Before I explain my preferred approach to law reform, I will discuss what I think must form the basis of an intestate succession law in Ghana; it is upon this basis that I construct my mutual concession approach.

### **The basis of an intestate succession law in Ghana**

Generally, the rules of intestacy should be designed to reflect the presumed intention of the deceased; to meet the needs of the survivors; to recognize the contribution of the survivors to the accumulation of the intestate's estate, and to promote the institutions of the nuclear and extended families. Lastly, the mode and pattern of distribution must be seen as fair by potential beneficiaries and should not create disharmony or disdain for the legal system.

I maintain that the intestate succession law of Ghana must be premised on two fundamental ideas to ensure compliance with state law, especially in rural Ghana.

First, rules of intestacy should reflect the presumed intention of the intestate. This may be at odds with customary law; however, this recommendation does not represent an assertion of unrestrained individual volition, knowing that this freedom could be abused. Hence, the intention of the intestate should be determined further in light of reasonable community expectations. Though a liberal approach, it is important to determine the intention of the intestate because my aim is to balance interests and not to cater solely to the needs of the customary legal system. Moreover, a number of Ghanaians live at the intersection of state law and customary law and must also be given a voice.

The courts should be able to balance individual and community goals relying on my proposed mutual concession approach, which I discuss later. The ‘presumed intention’ of the intestate may be determined additionally, by the reasonable expectations of those similarly culturally and socio-economically situated as him or her, and by considering the collective view of this community as to what is fair and equitable in the circumstances. Understandably, this argument raises justifiable questions about what constitutes “reasonable expectations” and those “similarly socio-economically situated.” While, in theory, explaining these expressions may be challenging, I contend that this may be less so in practice. For instance, the reasonable expectations of an intestate, whether a rural dweller or an urbanite may be determined by considering the social circles he or she kept and the sociocultural and economic outlook of the people in these circles. Additionally, the extent of the intestate’s own involvement with the extended family, and whether the intestate prioritised responsibilities towards his or her nuclear family to those of the extended family, may be considered by the courts in determining the reasonable expectations of the intestate with respect to the distribution of his or her property. Thus, those “similarly socio-economically situated” may be described, simplistically, as a group of people with similar social, familial and financial circumstances, and the views of such people on intestate succession may describe their “reasonable expectations.” I agree that my answers to the meanings of the expressions used are rather simplistic, but my intention is to provide a framework for considering the issues highlighted, and not to provide conclusive answers.

Second, for the purposes of intestate succession in Ghana, the rules must reflect the importance of the matrilineal and patrilineal family systems upon which the system of customary intestate succession is based. By so doing, the rules would inevitably reflect the need to reward kindness and create an incentive for people to invest in others, as the extended family has a reputation for doing. In Ghana, the family is recognized as a legal entity which plays various meaningful roles in the lives of its members “from the cradle to the grave” (Daniels 1996, 185; see also, Nukunya 2016, 64–65). Ghana’s Child and Family Welfare Policy (2015) acknowledges the nurturing role of the extended family in the Ghanaian society, especially in the care and protection of children. According to the report,

Ghanaian children grow up in closely connected extended family networks, with strong cultural traditions governing their birth, socialisation and upbringing. In many communities, particularly in rural areas, members of the wider extended family have an influential role and are expected to participate in the upbringing of children. Their involvement is seen as essential to ensure that children grow up into responsible and

respectful individuals. Informal fostering, whereby a child is sent to live with another relative, typically an aunt or an uncle, is also common... Informal foster care has typically been used as a 'safety net' for children from poor families who live with and receive support from relatively wealthier family members as much as a protection mechanism for children at risk of deprivation or who have experienced maltreatment primarily within the home (1).

Every Ghanaian is believed to belong to a traditional family (Ollennu 1968, 159). In fact, among the things which a Ghanaian treasures most is belonging to a family. The family is believed to be united by blood ties. As Ollennu explains, "the family denotes a group of all the members each of whom was fed and nurtured by a common sacred blood in the mother's womb" (Ollennu 1966, 77). All members of the family who do not share this blood are outside the lines of inheritance.

The foregoing proposals reflect the Ghanaian fact-situation. Admittedly though, while a judge, with minimal difficulty, should be able to take the preceding considerations, though somewhat theoretical, into account, outside of the court, my proposed basis of an intestate succession law could, debatably, detract from legal certainty.

The current allocations to the beneficiaries in the Intestate Succession Act are based on the assumption that there have been considerable changes to the concept of family in Ghana. But upon what basis was this assumption made? Just by observing the lives of the privileged few who live in the urban areas? A study of testator habits and distribution preferences and public opinion on such, not only in rural Ghana, but also in the cities may be useful in shaping the law for the future. If such a study were conducted, it would enable the state to understand that the habits and expectations of a rural testator differ from those of the urban testator. The study would also, in my opinion, provide the state with first-hand information about how well Ghanaians understand their laws and comply with them, especially reformed customary law. This is very important as it would give the state useful ideas about the possible changes it needs to make in order to improve its law reform procedures and strategies.

My recommended basis of an Intestate Succession Law in Ghana is based essentially on an informed presumption that compliance with state law will be higher if such laws reflect existing customary norms and beliefs. Erin Goodsell, a lawyer, seems to agree that connecting traditional and "foreign" modes of thinking on a given subject is an effective law reform tool. Sharing her views on customary law and human rights in South Africa, she suggests that, courts and lawmakers in South Africa "would be well-served to examine sources of social justice in customary law and to combine human rights" aims with traditional modes of thinking. This, she says, "would help to make human rights a concept that better resonates with the South African people." (Goodsell 2007, 113). It can be inferred from her view that once the concept of human rights resonates with the beliefs of the people, they will adhere to state laws on human rights. Similarly, Kwadwo Appiagyei-Atua, a legal academic, emphasizes that integrating an African perspective of rights into the concept of human rights would make such rights "accessible and meaningful to Africans" (Appiagyei-Atua 2000, 168); accessibility and meaningfulness suggest familiarity, and ultimately, greater compliance with human rights legislation.

Some practical evidence in support of my argument is found in an investigative report published by the Commission on Human Rights and Administrative Justice (CHRAJ). Briefly, the CHRAJ undertook an investigative research project in the Volta region of Ghana to ascertain, among other things, the extent of cessation of the criminalized practice of ritual servitude. Ritual servitude is a practice whereby mostly female virgins are held captive as ‘sacrificial lambs’ to atone for the sins of a family member. It is based on the belief that the sin committed also wrongs specific deities and ancestral spirits who must be pacified lest they visit their wrath upon the family of the wrongdoer. (CHRAJ 2008, 7). The report revealed that the practice had declined considerably, not just because it had been criminalized, but primarily because the state and some civil society organisations had presented the shrine owners with an alternative ‘victim’ for ritual servitude, that is cows, among many other items. In other words, cows were sacrificed in place of human beings. By presenting the shrine owners with cows, the donors acknowledged traditional understandings about wrongdoing, the belief that sins must be atoned for, and with something tangible. Also, the wording of the law prohibiting the practice shows that the practice of ritual servitude was not necessarily abolished; it was the use of humans that was proscribed.<sup>6</sup> Thus, the law reflected the traditional ideas, values, and beliefs that the people held - that objects of sacrifice are critical to averting calamities from being visited on the people by deities and ancestral spirits. This demonstrates that if state laws reflect customary norms, there is a high probability of compliance, especially by rural dwellers.

Upon my proposed basis of an intestate succession law, I now analyze my mutual-concession approach: a principled, structured, discretionary and pluralist approach to law reform.

### **Preferred typology: the mutual concession approach**

Gordon Woodman and Bradford Morse do not demonstrate how the proposed measures discussed earlier actually work since their aim was to contribute to a general theory of legal pluralism (Morse and Woodman 1988, 5–24). Miranda Forsyth goes a step further to provide the methodology for doing so. She concentrates on practical ways of employing a pluralistic approach to solving compatibility problems that may exist between a state and non-state actors (Forsyth 2009). For instance, she suggests the adoption of a less adversarial approach to litigation since many aspects of customary justice systems are closer to the procedures and approaches of the inquisitorial system used in many civil law countries than the adversarial approach used in common law countries. Furthermore, she advocates for the reform of the laws of evidence to make them less complex and more culturally relevant. On the other hand, she invites the customary justice system to introduce good management initiatives, such as record keeping in its justice system in order to ensure consistency in its decisions (229–230).

The mutual concession approach merges Woodman and Morse’s incorporation and acknowledgement models. It also includes similar aspects of Forsyth’s fourth and fifth reform models, where the state gives formal acknowledgement to the jurisdiction

of the non-state system, and limited legislative recognition to a non-state system respectively (Forsyth 2009, 210, 214). These models, if combined in varying degrees will, in my opinion, provide an equitable framework for the sharing of property upon death intestate. This is the focus of the next section.

### ***Sharing the estate***

Regarding the relevant provisions under PNDC Law 111, where the deceased is survived by a spouse, child and parent, the estate is divided into 16 parts, three parts are given to the surviving spouse, nine to the surviving children, two to the surviving parents and two parts are distributed in accordance with the rules of customary law. Second, where the deceased is survived by a spouse and parents but no child, the residue is divided into four parts, with two parts going to the spouse, one part to the parents and one part devolving according to the rules of customary law. Third, where the deceased is survived by only a child and parents, the estate is divided into eight parts; six parts go to the surviving child or children, one part to the parents and one part devolves according to the rules of customary law. Fourth, where the deceased is survived by only a parent, the estate is divided into four parts, with three parts going to the surviving parents and one part devolving according to the rules of customary law. Finally, where the Intestate is not survived by a spouse, child or parent, the entire estate devolves in accordance with the rules of customary law, making the customary family the sole successor (PNDC Law 111, s.5–8).

The mutual concession approach is open to the state incorporating norms of customary law into state law, thus formally acknowledging the legitimacy and the operation of the customary law of succession. Evidently, PNDC Law 111 incorporates customary norms into state law and in this regard, norms of customary law are enforced by the state. It also recognizes the importance of the traditional family system and acknowledges the existing legitimate powers held by a customary institution, the traditional family (Morse and Woodman 1988, 19). However, the customary norms incorporated into the PNDC Law 111 do not fairly represent the norms of the customary law of succession. Specifically, the allocations made to the extended family are not coterminous with customary norms. I argue that at the very least, the allocations should reflect the role that the extended family plays in the lives of its members, especially in rural areas. Not only do the negligible allocations counteract the acknowledgement given to the extended family, they also undermine the legitimate legal and socio-cultural expectations of rural Ghanaians. It is one thing to acknowledge customary law as a distinct and separate legal system and another to deprive it of functioning as such by virtue of the limited acknowledgement given to it.

Thus, the mutual concession approach proposes to share the entire estate differently. Under PNDC Law 111, the allocations made to the extended family depend entirely on those who survived the deceased. The allocations are fixed and are not dependent on the particular circumstances of the deceased, such as the role that the extended family may have played in the acquisition of the deceased's property. The mutual concession approach advocates a deviation from the one-size-fits-all approach to the distribution of property to a method that divides intestate property on a case-

by-case basis. Not all cases before the courts must be treated equally, because the circumstances of deceased persons differ. The courts must be allowed to exercise discretion in determining the entitlements of the various classes of beneficiaries. In view of this, I propose a law that allows the courts to take the following important guidelines into consideration.

First, in sharing intestate property, the courts should determine the financial investment that the extended family may have made in the deceased. For instance, the courts should consider whether the deceased's education was paid for by his extended family. If there is sufficient evidence to support such an investment, a reasonable portion of the estate should be given to the family. This is fair, equitable and largely consistent with the legal views of the customary legal system. Fenrich and Higgins explain that some of the people they met in Ghana in the course of their research, expressed the view that the share of intestate property given to the traditional family under PNDC Law 111 was not sufficient, given the importance of the family to most Ghanaians. They report that in an interview with the late Justice George Acquah, then a Supreme Court Judge and later a Chief Justice of Ghana, he gave an example of a man whose education was funded solely by his brother, only for his estate to be inherited by his wife and children under PNDC Law 111 (Fenrich and Higgins 2001, 324, footnote 312). According to Mensa-Bonsu (1994, 111), there are several prominent persons in Ghana whose education was sponsored by family members, using their own resources or family resources, and that such people "represent a family investment which by reason of [PNDC Law 111] would yield no dividend." It should be recognized that there is an expectation of reciprocity when one is cared for by the extended family; it is a social security system, where members are obligated to help each other. I maintain that Individuals who are cared for by their extended families lose the right to provide for only their nuclear family; they must give back. The requirement of reciprocity is captured in a Ghanaian proverb, *if your elders take care of you while cutting your teeth, you must in turn take care of them while they are losing theirs*.

It must be recognised that the extended family also constitutes an economic system in which "skills are funnelled through co-operative effort in the exploitation of resources and their equitable distribution" (Agbosu 1983–86, 108; see also, Twerefou, Ebo-Turkson & Kwadwo 2007, 29). In *Re Krah*, a head of family ensured that family resources were used to purchase a large tract of land for the use of family members (*In Re Krah* [1989-90] 1 GLR 638-670). In addition, the family decided to "utilise revenue from family lands to acquire new farming lands for the benefit of family members" (666). Portions of the family land were also leased to strangers. Such investments ensure that all family members, especially the poor ones, have an opportunity to improve their standard of living. Thus, the opportunities created for the deceased by his or her extended family should be taken into consideration by the courts in sharing intestate property. It is fair to recommend that the court should also take into account whether the deceased has, to some extent, reciprocated the assistance given him or her. For instance, the court may consider whether the deceased financed the education of other family members or acquired property for the family during his life time. If the deceased has done any of these, it should inform how the allocations are made by the courts.

Second, the courts should consider the extent to which the deceased's source of livelihood could be traced to his or her family. It is a fact that some individuals trace their wealth directly to their extended families. It is not uncommon to find individual homes built on family land or land handed over to family members for their personal use. A Ghanaian legislator observed that the fact that a person has registered a house in his or her name does not mean that it belongs to him or her and that "we all know in this country [Ghana], [t]here are countless cases ... where [the] family might have given [one] money to buy the house" (July, Official Report of Debates of Parliament, Ghana 2012b, para 3147-Hon. Dr. Prempeh). In *Re Krah*, a head of family, the testator, instructed the first plaintiff, "the family cashier," to use family money to acquire a large tract of land for family use. As head of family, the testator, who was wealthy prior to his appointment, gave out portions of the land to family members, labourers and other strangers on various terms. In his last will, he gave the farms that he had developed on family property to his grandson, the third defendant. The plaintiffs brought an action against the beneficiary claiming that the farms belonged to the family and could not be devised to the defendant. The Court held that there was sufficient evidence to show that the disputed farms belonged to the family, even though the head of family treated them as his own (640). The deceased may have been wealthy before his appointment as family head, but that did not change the fact that he used family resources to his advantage. In sharing the property of such a person, the courts should be mindful of this fact. It is important to note the power wielded by the testator over family resources, to the extent that it appeared as if the property in dispute was his. According to the court, "[i]t is not surprising that ... in perfect freedom" (660) the deceased dealt with family property like it was his own.<sup>7</sup> It added that "[t]he fact that he gave away pieces of those lands by himself is in keeping with his traditional role as head of family" (660).

Also in the case of *Badu v Kra* [1991] 1 GLR 563, a testator devised a house to his children, the plaintiffs. Members of his extended family, the defendants, challenged the gift, contending that the house in question was family property because the deceased acquired it from proceeds of family farms he inherited in his position as customary successor. The Court held that when a person inherits family property, any subsequent property he acquires does not become family property and that the evidence showed that the testator acquired the house through his own hard work (565). Had this case been about intestate succession, the mutual concession approach would have demanded that the courts give serious consideration to the defendants' claim and compensate them. This is because one cannot benefit from the customary legal system, especially by virtue of one's position as customary successor, and then make a will giving all that one has acquired to one's nuclear family. No wonder when the will was read, members of the extended family were "annoyed" and "protested against" the will (564). The house in question may not strictly have been family property, but it would seem that the family property that the deceased inherited was useful to him. The courts must ensure that the extended family is not unduly exploited for individual gain.

Third, the courts should consider whether the extended family was socially and morally supportive of the deceased. In this regard, the courts should determine

whether the family cared for the deceased, especially when he or she was sick. It is not uncommon in Ghana to find spouses taking their sick spouses back to their relatives to be taken care of, particularly when death is imminent. A legislator pointed out that the current bill on intestate succession does not reflect the importance of the extended family. He observed, “[w]e all know that in ... other jurisdictions, especially those advanced ones, there are ... proper and well-packaged welfare systems to take care of the physically challenged. But in our situation, many of the physically challenged continue to depend on the family.” (Parliamentary Debate 2012, para. 82 – Hon. Yaw Baah). In *Re Sackey* [1992] 1 GLR 214, a widow was accused by the family of her deceased husband of having deserted him for five years before his death, two of which he was bedridden. The extended family, the defendants, led evidence to show that the widow, the first plaintiff, deserted her husband. The family contended that during this critical period, it cared for the deceased. Whilst admitting that she went to live in another town during this period, the widow claimed that she did so with the consent of her husband. She also claimed that the move was to enable her to work and provide financially for her husband and children and that she went back home to visit every weekend. The Court said that, “[i]f what the first plaintiff said was the truth it would appear to be an arrangement between the married couple which was not known to outsiders.” (221) However, the Court admitted that “if the defendants deposed that the first plaintiff deserted the husband they would be speaking the facts as they honestly knew them to be true” (221). This case illustrates how the extended family is relied upon to care for their sick relatives when the need arises. These services should be rewarded. In fact, PNDC Law 111 makes similar arguments in favour of surviving spouses. According to the Act, “a surviving spouse [must] be compensated for his or her services to the deceased spouse.” (PNDC Law 111, i) It goes on to say that “[i]t is right that the husband ... she [surviving spouse] has probably served, is the person on whose property she must depend after his death” (i). What the state is saying is that those who render services to the deceased during his life time must be compensated. It seems hypocritical that the state would assume that in a communalistic society like Ghana, the only person likely to render valuable services to the deceased is the surviving spouse. The same argument made for the surviving spouse, and which is a basis for which the spouse is entitled to a decent portion of intestate property, should also be made in favour of the extended family. However, the courts should determine if the caretakers were paid for their services and take this into account in sharing property.

Fourth, the courts should invite evidence of the involvement of the deceased in the affairs of his or her extended family and vice versa. They should ascertain whether the deceased held any customary position in the family. Whether he or she attended family meetings and other related functions, and paid his or her share of family dues to meet family responsibilities is also important. This may be indicative of his or her intentions. The very nature of the relationship that the deceased had with his extended family should raise a presumption of an intention to bequeath property to them. In *Re Wiredu* [1982–83], the deceased, who died intestate, had during his lifetime acquired a house and invited his nephew and other family members to move in. The nephew, the defendant, lived in the house for more than ten years. On the death

of the intestate, the defendant sought to claim the house as his own, but could not prove ownership. Nevertheless, the kindness that the deceased showed his family in his life time suggests that he wanted the family to be well taken care of (*In Re Wiredu (Decd.)*; *Osei v Addai* [1982-83] GLR 501-509). The deceased demonstrated a commitment to family and an intention to support them. It does not mean that once you support someone during your lifetime you intend that person to benefit from your estate. The nature of the support must be examined; if it transcends what is usually done, it suggests a close relationship and an intention to care for the receiver. Such acts done by the deceased during his lifetime should guide the courts in determining his or her intentions toward the extended family and influence how the deceased's property is shared, unless there is reason to believe that the deceased intended the assistance to stop after his death.

In *Re Sackitey* [1987-88] 2 GLR 434, the testator went as far as to open a bank account with his niece so that she could manage his financial affairs. The testator's nephew also lived and worked with him for a period; they had a very close relationship (442). The fact that such relationships raise a presumption of an intention to support was proven by the deceased, who in his will, gave a decent portion of his estate to his family members. According to the court, "[h]is magnanimous side was reflected in the distribution of his estate to every deserving member of his family" (437). Thus, the court must examine the relationship that the deceased had with his extended family and how involved the deceased was in their lives. This should enable the courts to decide the portion of the estate that should go to the family. By so doing, the court will be giving effect to the intention of the deceased, in light of reasonable community expectations.

Fifth, the courts should consider the persons who will bear or who bore the funeral cost of the deceased. Under customary law, the extended family is under an obligation to give the deceased a funeral befitting the status of the deceased and that of the extended family. It is the family's prerogative to decide when and where to bury the deceased (*Neequaye v. Okoe* [1993-94] 1 GLR 548). Usually, every family member is levied to pay the cost of the funeral (Mensa-Bonsu 1994, 111; *Neequaye v. Okoe*, 546). The family focuses on providing the deceased with a decent burial because of traditional beliefs in life after death and the role of ancestral spirits in the lives of living family members. This is done without first considering whether the deceased left behind enough money for the necessary rites. Belonging to a family includes the concept of the individual being under the control of the family. According to an editorial report, "[h]ardly ever a somber, low-key affair, Ghanaian funerals are a social event attended by a large number of mourners, which could reach hundreds – the more, the better." The report continues that "[a]n average funeral should cost between \$15,000 and \$20,000." (Newton 2014).<sup>8</sup> The courts must ascertain the extended family's contribution and take this into account when sharing intestate property. According to a Ghanaian proverb, which was analyzed by the High Court, "he who buries the leper is the person who is entitled to have the leper's sandals," meaning, the family responsible for the burial of a deceased person inherits his property (*Neequaye v. Okoe*, 545). Mensa-Bonsu (1994, 111) asks:

what would be the justification for levying every member when the family would derive no benefit from the deceased? Why should the family organise the funeral (even of its indigent members) when any property there is would go to somebody else?

The answers to these questions should help the courts adjust the allocations accordingly; otherwise, Ghanaians will lose the much-cherished support of the extended family.

### ***Sharing small estates***

Under the current law, a sole surviving parent or child is entitled to the whole estate if it does not exceed a sum fixed by the sector Minister (PNDC Law 111, s 12). This is to ensure that the estate is not fragmented and devalued. My approach to sharing a small estate differs. The courts should give the extended family a token to acknowledge its importance as a system of social security. The token may even be an item of clothing of the deceased, which of course may also have sentimental value. The reality is that some people leave behind very small estates, which can barely support the surviving family, and it is actually in such cases that the extended family's role becomes even more significant. Even the state expects this of the extended family. According to PNDC Law 111, "it is expected that the legal and moral responsibilities of the members of family toward the welfare of the children will not be remitted" (PNDC Law 111, ii). Especially in rural areas, "it cannot be denied that 'families can deliver far more than the state. They look after nearly all the nation's children, while state authorities only look after a tiny minority'" (Daniels 1996, 184). It has been the practice that in case of hardship encountered by a person, family members rally to provide relief. In fact, "[o]ne great advantage of the traditional family is that ... they offer the best hope that unwanted children or spouses or grandparents will not be cast aside" (184). Unlike most developed countries, Ghana does not have a meaningful and workable system of social security. This role resides with the customary family. Through this system, people have been given opportunities for education, been set up in trades and have had their children and spouses well taken care of on their death. Hopefully, the token will encourage the family, if need be, to assist the surviving child, spouse or parent.

### ***Recognising limits***

Like PNDC Law 111, there are limits to what the extended family can inherit under the mutual concession approach. The mutual concession approach is aimed at balancing interests and does not support an approach that seems to favour one group of beneficiaries. Thus, where the deceased is survived by a spouse, children and parents, the portion given to the extended family should not exceed 25 percent of the estate. If the deceased leaves behind a child and spouse, or a child and parent or a spouse and parents, the extended family should not be entitled to more than 30 percent of the estate. Again, where the deceased is survived by a spouse or a child, or parents only, the portion given to the extended family should not exceed 50 percent. In this regard, the difference between PNDC Law 111 and the mutual

concession approach is that the percentages prescribed by the latter are based on what seems to be a fair amount if divided equally among the classes of surviving relatives. It is envisaged that these proposed percentages will appeal to the extended family because under the current law, PNDC Law 111, it is entitled to far less and will be entitled to an even lesser percentage should the Intestate Succession bill, 2013, ever become law.

In dividing the estate, the courts should endeavour, as much as possible, to ensure that surviving spouses and children are given the matrimonial home and most of the chattels of the deceased. This proposal is to ensure that a surviving spouse and children are not left homeless and without the basic facilities that they have become accustomed to.

The portion given to the extended family, after the court's determination, may then be shared strictly according to customary law. Under customary law, the properties, particularly, the immovable ones are usually not shared among members. These belong to the entire family and are managed by the customary successor of the deceased (*Ansaba & ano v Mbeah & ano*. [2010–2012] 1 GLR 691). While satisfying the presumed intention of the deceased, the mutual concession approach also furthers the collective view of the community as to what is fair and equitable in the circumstances.

### **Assumptions**

The mutual concession approach rests on certain fundamental assumptions: that law embodies values and that a deeper understanding of the various legal systems will show that the state and customary legal systems are not too far apart in their conceptualization of these values. The approach also assumes that both the state and customary legal systems are committed to furthering the common good of their subjects. The state has declared its commitment to liberty, equality of opportunity and prosperity; friendship and peace; freedom, justice, probity and accountability; the rule of law; unity and the protection and preservation of fundamental human rights and freedoms (see the preamble of the Constitution of Ghana). The customary legal system on the other hand, “does that which is reasonable” (Ollennu 1971, 151), is “all about truth and reforming the bad in the society” (CHRAJ 2008, 55) and ensures that members are each other's keepers (January, Official Report of Debates of Parliament, Ghana 2012a, 90–92 – Hon. Cletus Avoka). Under this system, it has been asserted that, compatriots are not neglected, the physically challenged are cared for (82 – Hon. Yaw Baah) and resources are equitably distributed (Agbosu 1983–86, 108). In sum, it seems that, both the state and customary legal system are committed to promoting the welfare of the people, their rights, security and general prosperity. The mutual concession approach is based on the assumption that law reformers can appeal to these inherent values, as a basis to reconcile the customary and state legal systems.

It must be acknowledged that even though the customary legal system has been described in such glowing terms, it is well documented that, especially before the promulgation of PNDC Law 111, prominent customary legal actors such as family

heads and customary successors<sup>9</sup> in matrilineal communities abused their positions of trust in respect of their responsibilities towards widows and children. In most cases, they ejected the widow and children from the matrimonial home on the death of their spouse and father respectively, leaving them destitute - a situation Akua Kuenyehia, a legal scholar, attributes to the “present individualistic age” (Kuenyehia 2006, 392–393; see also, Dowuona-Hammond 1998, 145). Admittedly, the inability of customary successors to ensure equity in the distribution of property called the effectiveness and fairness of the customary law rules into question and resulted in the promulgation of PNDC Law 111.

### **Advantages of the mutual concession approach**

The mutual concession approach suitably merges Morse and Woodman’s “incorporation approach,” which Woodman argues entails the distortion of customary law, (Morse and Woodman 1988, 15) with their acknowledgement approach, which recognizes the competence of the customary law system to perform all the functions related to the distribution of family property. The approach, thus, minimizes the full impact of the presumed adverse effects of the incorporation approach. Merging the incorporation approach with the acknowledgement approach, recognizes the customary legal system as a distinct and legitimate legal system, and ultimately paves the way for effective reforms.

The mutual concession approach is about balancing interests. It challenges the customary law principle that intestate property is exclusively extended family property, but it also contests the state’s preoccupation with catering almost solely to the needs of the nuclear family. The mutual concession approach requires of both systems to make adjustments to their respective positions on the determination of qualified beneficiaries. It ensures that the extended family, and what it stands for, is not sacrificed in the process of trying to protect the nuclear family. Neither is the nuclear family deprived of a decent share of intestate property.

The mutual concession approach draws on the values of custom and human rights to enhance custom and advance the application of human rights (Forsyth 2009, 233). Traditional concepts of law recognize that the surviving spouses and children must be taken care of; such concepts also reflect the belief that aged parents must be provided for. This explains why the traditional system of allocation makes provision for these groups of people. It must be stressed that it is important to the customary legal system to be seen as a fair system. (CHRAJ 2008)<sup>10</sup> The rural communities believe that the customary legal system is “all about truth and reforming the bad in the society” (55). Thus, it is reasonable to assume that since both the state and customary legal systems essentially seek the well-being of the surviving family, though with different emphases, it is possible to have a law that can capture the demands of both. The mutual-concession approach, therefore, has the advantage of taking people back to the drawing board to focus on the true meaning of the common good, the basis of legal pluralism.

Again, the importance of the mutual-concession approach lies in the fact that it allows cross fertilization of ideas and procedures between the two systems. It

fosters greater interaction between legal systems and reminds them that their presumed independence and freedom requires a commitment to engage with changing values in order to perpetually promote the common good. It would seem that this is what Allott meant when he suggested that reformers, after abstracting from customary law what is of benefit should seek “to dovetail this with the imperatives of life in a society which grows steadily more complex and more closely orientated towards the world outside” (Allott 1984, 70).

Also, this approach fulfils the prescription of sensitivity to existing traditions that many scholars have been advocating for years (Kutsoati and Morck 2012, 48). It demonstrates respect for the customary legal system as a legal system in its own right. It is my opinion that the proposed legislation reflects the basic concepts of customary law such as fairness, and will be embraced by the extended family. Furthermore, it empowers local communities within the context of their traditional cultures (Kutsoati and Morck 2012, 48–49). They are not just empowered within the context of state law, but also their own law and this has the advantage of inspiring confidence in the state legal system, a feat that a purely incorporation approach would not achieve (Morse and Woodman 1988, 15).

Again, it does not create contradictions in expected obligations, a problem that legal pluralism has been accused of. For instance, Tamanaha, (2008, 375) explains that legal pluralism “may give rise to multiple uncoordinated, overlapping bodies of law, which may make competing claims of authority and impose conflicting demands or norms.” Each system will still be permitted to operate fully within its sphere of control. This has the advantage of precluding reform methods, such as ascertainment and codification, which privilege certain voices in the determination of law (Isser 2012, 242; Campbell 1988, 372). The fact remains that these reform methods, which record customary law at a given point in time, cease to represent the actual practices of the people as the living law changes (Mbatha 2002, 260–264).

The approach also permits the preservation of the reasonable features of both legal systems, especially the customary legal system, as it has the potential to keep the extended family still focused on its social responsibilities towards its members. This is in line with Allott’s suggestion that reformers should abstract from customary law what is of benefit, and in this case, to all Ghanaians. Further, the approach takes into account Ghanaian fact-situations such as the importance of the extended family beyond one’s childhood; the difference in perception of the marriage union among the urban elite as opposed to the rest of the society; the extent of illiteracy in the country; and the dependency of parents. It has been argued that these important factors were “ignored, or half-heartedly recognized” in the promulgation of PNDC Law 111 (Mensa-Bonsu 1994, 126).

Furthermore, the mutual concession approach celebrates legal pluralism by embracing the different conceptions of family. Both the state and the customary legal systems must embrace legal pluralism with all its frailties because it exists and is very likely to remain part of Ghana’s legal system. The mutual concession approach recognizes the fact that the state and customary legal systems have different concepts of family, which must be balanced. Lutterodt J., then a High

Court judge and the current Chief Justice of Ghana in the case of *Neequaye v Okoe* (1993–94) explained:

The trouble is that for the Ghanaian the word ‘family’ has a variety of meanings. Now when the educated top class Ga Mashie lawyer or doctor writes to his counterpart in the United States of America telling him he is going to the Caribbean Islands with his ‘family’ for a holiday, he no doubt means (and I am sure his friend would understand him in the same vein) that he is going away with his wife and children. I do not think that he has at the back of his mind his 60–70-year old auntie who lives at Bukom, although the possibility cannot be ruled out, especially if she happens to be a much loved auntie who has shown him extreme kindness during his school days, but ordinarily she could not be included... However, when the same Ghanaian lawyer, for example, passes by his colleagues house on Saturday afternoon and informs him that he is attending a family meeting at Bukom, his friend no doubt expects a larger group of people than those referred to above (547).

This approach accommodates all these conceptions of family. Jenny Goldschmidt (1980, 57) underscores the need to accept the fact that there are two kinds of constitutional systems in Ghana: the national and the traditional systems. She maintains that in spite of their differences and similarities, they complement each other and cautions against damaging the integrity of either. She admits that the traditional structures are the best way for ensuring the involvement of the people in the public life of the country.

Finally, the mutual concession approach seeks to achieve one thing, that is, to ensure the law reforms are effective, especially in the countryside. Using this approach, PNDC Law 111 is likely to be embraced because the extended family will get its due share of intestate property. Members of the nuclear family may no longer feel obliged to comply with the traditional inheritance rules just to be at peace with the extended family because the mutual concession approach, unlike PNDC Law 111, presents a win-win outcome; you get what you work for and you enjoy your share in a manner that accords with your core beliefs.

### **Problems with the mutual concession approach**

My reform approach is based on compromises; it is inherently about reconciling values. As such, it invites debate about values. More specifically, my approach draws on the social values of law and custom, and abstracts from customary law what is of benefit while demanding a commitment to engage with changing values in order to perpetually promote the common good. Any project that centres on an examination or analysis of values cannot escape the problems inherent in such an elusive concept. It invites legitimate concerns which revolve around the meaning of values, how and who determines them. Focusing on values shared by communities and legal systems and even those inherent in the law is simply problematic; it presupposes that all the people in a given community share the same set of values and aspirations. Such an assumption is false. It is not realistic to expect a community to have one agreed set of values (Woodman 1975, 17; Samek 1977, 414). Do we focus then on the values of the dominant or elite groups, if any, and deem them representative of all the others? (Harvey 1966, 346). And is there always just one dominant or elite group?

Additionally, does an approach to law reform that relies on the determination of values, not privilege certain voices in the determination of which values are important and which ones are acceptable candidates for the reconciling process? As Robert Samek (1977) asks of the reformer, “[w]hat right has he, it may be asked, to impose his subjective values on the rest of us?” Samek insists that “he cannot force his values down other people’s throats” (414). It is not realistic and even possible for a reformer to surrender his own values and standards “and become [a] mere administrator[] of conventional values” (429).

Furthermore, assuming that such values exist, how does the reformer identify them? Woodman argues that it is not realistic to expect a community to have one agreed set of values and suggests that the investigator in his or her inquiry should not attempt to find a single set of values, but rather to “eliminate certain lines of action” (Woodman 1975, 17). Though he admits that the elimination would be extensive, one wonders if the process is not susceptible to the same problems that are likely to be encountered in the process of looking for acceptable sets of values.

It has been suggested that the reformer should draw on his or her “human” motivation” in the determination of such values, in which case he cannot renounce his own values, but simply put them into perspective. The reformer has been counselled to “take as his perspective those communal values which are most consistently appealed to” by the people in question (Samek 1977, 414). As much as I agree with this statement, assuming a community espouses kindness as one of its central values, there is the problem of determining what this really means to the community. Both the state and the customary legal systems have indicated their respect for human rights, but quite evidently, the concept means different things to both systems. Nevertheless, I maintain that no matter the differences, it is possible to find common ground. On the issue of determining values in the Canadian context, Samek suggests:

[O]ur preferred values should be those which we purport to prefer, and as long as we pay lip-service to them, we should be estopped from going back on them. For instance, we should not on the one hand be allowed to boast of our respect for human life and dignity, and on the other hand to support capital punishment or inhuman forms of imprisonment. To speak of law reform in this context is to abuse the term. It is true that in a pluralistic society such as ours there is no nation-wide consensus on values, unless we generalize them to such an extent that they become empty motherhood statements. We must therefore be prepared to face conflicts in value, and what is more to live with pluralism. . . . [W]e should engage in a living dialogue of values which will result in a richer and more open mosaic. Only human beings, drawing on their “human” motivation, can bring this about (Samek 1977, 429–430).

Even though Samek gives these pieces of advice to the reformer in Canada, I maintain that his conclusions are largely applicable to most societies. As Samek (1977) suggests, people should be held to the values they espouse, but to reiterate, the critical issue is the meaning placed on those values by the holder. So when we are told that “[c]ustomary law does that which is reasonable” (Ollennu 1971, 151), we have every right to expect the system to be rational, just and fair-minded. But again, what do these expressions mean? Yes, values may conflict and may mean different things to different groups of people; for this reason, I contend that people must be empowered to assume other identities as the occasion demands in order to solve conflicts. Having

said this, I maintain that all cultures and ethnic groups have identifiable values, beliefs and attitudes that are considerably unique or distinctive (Trimble 2003, 16).

Admittedly, the mutual concession approach privileges the state. Like most legal pluralists, my work examines the reform of the law of succession from the perspective of the state, that is, I investigate the most efficient reform option available to the state (Tamanaha 2008, 379; Davies 2010, 810). This, I argue, is the reality of what the state has come to represent. Though the state may not wield the expected moral and social power, especially in rural Ghana, it has come to be associated with economic and political power, and legitimacy. It would seem that this reputation has come to stay. According to Sally Merry (1988, 879), “it is essential to see state law as fundamentally different from other normative orders because it exercises the coercive power of the state and monopolizes the symbolic power that is linked with state authority.” The mutual concession approach may seem to privilege the state, however, it acknowledges the limits of legal pluralism and the state’s dominance in the modern world, in spite of its limitations (Hooker 1975, 1, 8).

While the mutual concession approach may be more agreeable to the customary legal system than the current law, it does not purport to offer *the* solution to the low compliance rate. Law reform must be accompanied by a change in the socioeconomic and political circumstances of those whose lives are influenced largely by customary law. The economic underpinnings of the customary norms on intestate succession are not addressed by the mutual concession approach. It should be recognized that poverty and unemployment are two of the main reasons why the extended family in the past sometimes reneged on its responsibility of caring for surviving spouses and children, thereby necessitating the promulgation of PNDC Law 111 (Mbatha 2002, 261). Also, the power wielded by heads of families and traditional political functionaries is significant, but the mutual concession approach does not provide a framework for exploiting this power to facilitate reforms. It is established that this power is so daunting that surviving spouses refrain from challenging the customary norms of succession (Kutsoati & Morck 2012, 15–16). It would seem that customary law reforms must include this group of people. Additionally, the metaphysical beliefs about the sacredness of the blood shared by the members of the matrilineal families (Ollennu 1966, 77) and the spiritual beliefs that prevent surviving spouses from insisting on their rights are not addressed by the mutual concession approach (Gedzi 2009b, 12–13). Only an effort at leveling unequal socioeconomic and political circumstances, as part of the reform exercise, will engender change and foster a productive, stable long term relationship between the state and customary legal systems (Hammond 2016, 213–233).

Lastly, the mutual concession approach does not address the relational aspects of law reform. It assumes that legal actors in the legal systems will cooperate with each other, and this will result in compromises. In actual fact, certain active measures must be instituted to ensure that these actors are equipped to make compromises. Generally, the mutual concession approach will be more successful if legal actors in the state and customary legal systems change their attitudes about the nature of the relationship that should exist between them. For instance, the state actors should recognize that law reform does not mean forced assimilation, and thus desist from regarding the customary system as an inferior system that needs to be saved. The

customary legal actors must also respect the state as a partner in furthering the common good. A commitment to the common good may require the actors in both systems to adopt various identities in order to solve relational conflicts (Hammond 2016, 236).

## Conclusion

It is imperative that the state reforms certain customary laws in Ghana, because some of these laws undermine the protection and promotion of human rights as well as socioeconomic development. However, in a legally plural country, such reforms are bound to create conflicts between the state and non-state actors. These conflicts, a result of the different ideals and beliefs underpinning the different legal systems, can be managed, if not resolved, if law reforms are not seen simply as “technical errors,” which if fixed, will result in greater compliance with state law (Friedman 1994, 130). It must be emphasized that, legal systems are products of the “ideas, values ... and opinions that people hold, with regard to law and the legal system.” (118). Indeed, customary law is not “neutrally poised above political, social and cultural realities” of the various communities (Warwick 1999, 293). Thus, reforms must, at least, reflect traditional understandings about law, while being proactive enough to advance changing views about law, rights and responsibilities. The proposed mutual concession approach, in my opinion, balances the interests of both the state and customary legal systems in the sharing of intestate property. This stems from the fact that, not only does the approach reflect the importance of the traditional family systems, it also embodies values that are important to the state legal system, such as the need to protect the economic interests of the nuclear family. Hopefully, the approach should result in the readiness of the people, especially rural dwellers, to embrace the changes introduced by the reforms. Nonetheless, it must be acknowledged that the approach may not result in absolute compliance with the current law because there are other very important aspects of law reform that the state must address. These include reforming the socioeconomic and political structures that frame both legal systems, especially the customary legal system. Also, having a strategic relationship based on mutual respect between actors in the two systems is vital to effective law reforms. Such an inclusive approach to legal reforms is one of the surest ways of ensuring the protection of rights and freedoms and of “doing” legal pluralism (Forsyth 2009, xix).

## Notes

1. “State law” in this paper, refers to the laws passed by Parliament and signed into law by the President.
2. Before the passage of PNDCL 111, succession to intestate property, in most cases, was determined by the rules of the matrilineal and patrilineal family systems.
3. This section is repealed by s.19 of the Intestate Succession Act, 1985 (PNDC Law 111).
4. This section is repealed by s.19 of the Intestate Succession Act, 1985 (PNDC Law 111).
5. This view is attributed to only Gordon Woodman, and not to Bradford Morse.
6. The Criminal Code (Amendment) Act, 1998 (Act 554) s 314A criminalizes customary or ritual enslavement of human beings. It states that: (1) Whoever (a) sends to or receives at any place any person; or (b) participates in or is concerned in any ritual or customary

- activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labour related to customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years.
7. In view of the seemingly unlimited powers of the head of family in dealing with family property, the Head of Family (Accountability) Law, 1985 (PNDC Law 114) was passed to make the head of family accountable to the family for his management of family property. Kludze asserts that the old rule of customary law that the head of family was not accountable for family property held by him was actually judicial customary law based on a misinterpretation of a statement made by John Mensah Sarbah that “no junior member can claim an account from the head of family.” According to Kludze, under practiced customary law, the head of family has always been accountable for family property held or administered by him. See, AKP Kludze, 1987. “Accountability of the Head of Family in Ghana: A Statutory Solution in Search of a Problem” *Journal of African Law* 31:1–2, (Essays in Honour of A. N. Allott) 107 at 107–108.
  8. In the absence of official figures on the cost of an average funeral, it is hard to tell whether the amounts stated are accurate.
  9. This is a family member appointed by the customary family to administer the estate of the deceased for the benefit of the whole family, including himself or herself. He or she “steps into the shoes” of the deceased and ensures that the rights of the surviving spouse and children are honored. It should be noted that a customary successor is not the same as an executor, an heir or next of kin. A Customary Successor in Ghana is simply “a caretaker with a beneficial interest.” See, Nii Amaa Ollennu. 1968. “Family Law in Ghana.” In *Le Droit De La Famille En Afrique Noire et À Madagascar*, edited by Keba M’baye, 159–194 at 187. Paris: Editions G.P. Maisonneuve Et Larose 11.
  10. As I read the report, I was struck by the fact that the facilitators of ritual servitude, especially the priests, were disturbed about the bad reputation of the practice. I realized that the facilitators were determined to protect the integrity of the customary legal system. First, one respondent (facilitator) insisted that there was a clear distinction between the practice of ritual servitude and voodoo and that conflating them had given the practice a “bad name.” (17–18). Other respondents were concerned about the “false” information being disseminated that the ‘captives’ were not given the opportunity to attend school, (16) that they were sexually abused, (19) or were confined in the shrines and not allowed to see family members. (23) The facilitators were particularly unimpressed about the information published by researchers with whom they had cooperated, and who had “twisted the facts” (24) for monetary gain. (29) According to the report, the functionaries expressed “grief” about this. (24) A chief and respondent indicated that he was not happy about the “dirty words” used by expatriates to describe the practice.

## Acknowledgements

This paper is based on my PhD dissertation. In this regard, I would like to thank my supervisory team - Professors Wesley Pue, Karin Mickelson, Renisa Mawani, and Doug Harris - for their enlightening guidance.

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